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ALEXANDER L. STEVAS,

No. 82-862

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 22, 1982
CERTIORARI GRANTED FEBRUARY 22, 1983

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 22, 1978 — Plaintiff LeStrange's complaint filed in United States District Court for the Middle District of Pennsylvania.

October 26, 1979 — Plaintiff's Amended Complaint filed.

December 3, 1979 — Motion to Dismiss filed by Defendant Consolidated Rail Corporation.

November 4, 1980 — Order of Judge Rambo entered, granting Defendant's Motion to Dismiss Plaintiff's claims based upon the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. §1983, and denying Defendant's Motion to Dismiss Plaintiff's claim based upon §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

December 11, 1980 — Defendant's Answer to Plaintiff's Amended Complaint filed.

September 11, 1981 — Defendant's Motion for Summary Judgment filed.

October 20, 1981 — Order of Judge Rambo entered, granting Defendant's Motion for Summary Judgment on the issue of Plaintiff's standing to bring a private action under Section 504 of the Rehabilitation Act of 1973.

October 26, 1981 — Amended Judgment of District Court entered.

November 19, 1981 — Plaintiff's notice of appeal filed.

September 1, 1982 — Opinion and Judgment of the Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LESTRANGE,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION
v.	:	No. 78-944
	:	Jury Trial
CONSOLIDATED RAIL CORP.,	:	Demanded
	:	
Defendant	:	

AMENDED COMPLAINT

Now comes Plaintiff by his attorneys, Lenahan, Dempsey & Piazza, and for his Amended Complaint states the following:

1. Plaintiff, Thomas LeStrange is a handicapped individual, who resides at 1422 Olive Street, Scranton, Pennsylvania.

2. Defendant, Consolidated Rail Corporation (Conrail) is a railroad corporation duly organized and existing under and by virtue of the laws of the United States of America, specifically 45 U.S.C. Section 701, et. seq., and 45 U.S.C. Section 801, et. seq.; Conrail is presently doing business within the jurisdiction of this Court as an interstate Common Carrier with its local office located at 613 North Elmer Avenue, Savre, Pennsylvania.

3. This aciton [sic] is based upon a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. Section 1973, and 29 U.S.C. 794, commonly referred to as the "Rehabilitation Act of 1973" (as amended)

4. Subject matter jurisdiction is conferred upon this Court by virtue of 28 U.S.C. Section 1343(3), 28 U.S.C. Section 1331(a) and 42 U.S.C. Section 1983.

Conrail, as a recipient of Federal financial assistance, is subject to the jurisdiction of the "Rehabilitation Act of 1973", as aforesaid.

COUNT ONE

5. The plaintiff incorporates by reference all of the allegations contained in paragraphs one through four, inclusive, as though the same were fully set forth at length herein.

6. On March 17, 1971, plaintiff suffered the amputation of his left hand and a portion of his left forearm. Prior to that time, the plaintiff had been employed as a Locomotive Engineer with the Erie Lackawanna Railroad.

7. On April 17, 1971, plaintiff reported for work as an engineer with the Erie Lackawanna Railroad but was refused employment without a medical evaluation or a hearing.

8. During 1973, Conrail became a successor in interest to the Erie Lackawanna Railroad and the defendant refused to employ the plaintiff without medical evaluation or hearing.

9. From 1973 to April 4, 1978, the defendant refused to employ the plaintiff in any capacity and said refusal was made without benefit of medical evaluation or hearing, even though the plaintiff was at all times ready, willing and able to work as an engineer.

10. On April 4, 1978, Conrail authorized a medical examination for the plaintiff to determine his employability. On May 2, 1978, the defendant, without a hearing, classified the plaintiff as not qualified for the occupation of engineer.

11. From 1973 to the present, the plaintiff has repeatedly requested to be re-employed as a Locomotive Engineer and has, in the alternative, requested that a hearing be held to determine his fitness for the aforesaid position. All of said requests have been summarily de-

nied by the defendant. At the present time, the plaintiff remains ready, willing and able to return to work.

WHEREFORE, plaintiff demands judgment against the defendant as follows:

1. Enjoining the defendant from continuing in its discriminatory hiring practices of refusing to hire qualified handicapped individuals;
2. Reinstatement of plaintiff in his former employment position or the equivalent thereof;
3. For a sum of money equal to plaintiff's full back pay, including regular periodic increases allotted to his position;
4. Attorney's fees, costs, and such other relief as the Court believes proper.

COUNT TWO

12. Plaintiff incorporates by reference all of the allegations contained in Paragraphs One through Eleven, inclusive, as though the same were fully set forth at length herein.

13. On February 15, 1979, Conrail scheduled a field test for the plaintiff in order to determine whether the plaintiff could perform the duties of a yard engineer.

14. The field test created by ConRail to determine Plaintiff's employability as a yard engineer was willfully and purposely prepared in such a manner so as to insure Plaintiff's failure, in that the test:

(a) contained duties which were rarely or never performed by a yard engineer;
(b) contained duties which were performed with the assistance of other railroad employees;
(c) was created with special duties which could only be performed by an individual with full use of both hands.

15. Notwithstanding the unusual duties included in the field test as aforesaid, the plaintiff was able to perform substantially all of these duties and particularly, those duties which are normally performed by a yard engineer.

16. Due to the numerous irregularities of the first field test, a second, revised, field test was to exclude those duties not normally performed by a yard engineer and it was to be administered by different ConRail officials. Further, the second test was to be administered on a yard engine and not on the locomotive used outside of the yard.

17. The second field test was willfully and purposely created in order to disqualify the plaintiff as a yard engineer in that:

(a) the test was to be administered by the same individuals who administered the first test;
(b) certain railroad equipment, to be used in the test, was concealed or placed in inaccessible areas;
(c) plaintiff was informed that his failure to complete all of the duties in the first test would insure his failure on the second test;
(d) plaintiff was to be tested on three different locomotives, rather than on the locomotive normally used in the railroad yard.

18. By virtue of all of the foregoing irregularities, plaintiff refused to submit to the second test created by the defendant.

19. The defendant has since 1973 willfully and maliciously delayed the scheduling of medical examinations for the plaintiff and has also ignored the various medical reports which released the plaintiff for work.

20. The defendant has maliciously, willfully and purposely discriminated against the plaintiff since 1973, solely because the plaintiff is handicapped. Despite the fact that the plaintiff has at all times been ready, willing

and able to return to gainful employment with Conrail, the defendant has refused to rehire the plaintiff as an engineer.

WHEREFORE, the plaintiff, Thomas LeStrange, requests that This Court make an award of punitive damages in addition to the relief sought in Count One.

LENAHAN, DEMPSEY & PIAZZA

By _____
William J. Dempsey

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Thomas LeStrange	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
CONSOLIDATED RAIL CORPORATION	:	No. 78-944
	:	
	:	
Defendant	:	

ANSWER OF DEFENDANT CONSOLIDATED RAIL CORPORATION TO PLAINTIFF'S AMENDED COMPLAINT

Comes now defendant Consolidated Rail Corporation (hereinafter "Conrail") and answers plaintiff's amended complaint as follows.

FIRST DEFENSE

1. Denied.
2. Admitted.
3. Admitted that plaintiff purports to bring this action under statutes referred to in paragraph 3 but denied that said action is properly brought under those statutes.
4. Admitted that plaintiff purports to bring this action under statutes referred to in paragraph 4 but denied that said action is properly brought under those statutes.
5. Defendant Conrail incorporates the answers to paragraphs 1 through 4 above, as if fully set forth herein.
6. Admitted that plaintiff was formerly employed by the Erie-Lackawanna Railroad. Defendant Conrail lacks knowledge to respond to the balance of the averments in this paragraph.

7. Defendant Conrail lacks knowledge to respond to the averments in this paragraph.

8. Denied.

9. Denied.

10. Denied.

11. Denied.

12. Defendant Conrail incorporates the answers to paragraphs 1 through 11 above, as if fully set forth herein.

13. Admitted.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

SECOND DEFENSE

This court lacks subject matter jurisdiction over plaintiff's complaint.

THIRD DEFENSE

Plaintiff's amended complaint fails to state claim upon which relief can be granted by this court.

FOURTH DEFENSE

Plaintiff has failed to exhaust administrative remedies under the Railway Labor Act, 45 U.S.C.A. §151-188.

FIFTH DEFENSE

Defendant Conrail is not a successor in interest to the Erie-Lackawanna Railroad by virtue of the Regional Rail Reorganization Act of 1973, 45 U.S.C.A. §701 et seq., and other applicable law.

SIXTH DEFENSE

Plaintiff has failed to join a person, the Erie-Lackawanna Railroad, in whose absence complete relief cannot be accorded to plaintiff.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LESTRANGE,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION
v.	:	
	:	No. 78-944
CONSOLIDATED RAIL CORPORATION,	:	
	:	
Defendant	:	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant Consolidated Rail Corporation moves the Court for summary judgment in its favor on the issue of plaintiff's standing to bring a private action under Section 504 of the Rehabilitation Act of 1973. Summary judgment in Conrail's favor is appropriate because, as set out in the accompanying Memorandum of Law, plaintiff cannot show either that (1) the primary objective of federal financial assistance to Conrail is to provide employment or (2) that he is a primary beneficiary of a federally funded program which has a primary objective of providing employment.

Respectfully submitted,

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CONSOLIDATED RAIL CORPORATION

OF COUNSEL:

MORGAN, LEWIS & BOCKIUS

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF PHILADELPHIA :

I, RICHARD SEMERAD, being duly sworn, depose and say as follows:

1. I am the Director-Investments and Collections for Consolidated Rail Corporation with offices at 1300 Six Penn Center Plaza, Philadelphia, Pennsylvania.

2. In this capacity, I am responsible for preparation of forecasts used in periodic requests to the United States Railway Association (USRA) for disbursements under the Regional Rail Reorganization Act of 1973 (the Rail Act) and am familiar with the use to which funds received are put.

3. I have held my present position since October, 1977 and have been directly or indirectly responsible for the preparation of such forecasts since April, 1976. Prior to that time, I was an employee of Penn Central working on loan as controller of a company under contract with Penn Central to liquidate non-rail properties of the railroad.

4. Under the Rail Act, Conrail has received the following sums of money from the USRA:

(a) $317,800,000.00 under Title V; and
(b) $3.28 billion under §216.

5. All money received under Title V was a reimbursement to Conrail for money paid out by Conrail pursuant to the employee protective benefits imposed on Conrail by Title V.

6. Federal funds received under §216 were used to update Conrail's facilities and equipment, to pay principal and interest on outstanding debt obligations and to cover the operating expenses not met by operating revenues.

7. Exhibit A, attached hereto, sets forth the use of §216 money received by Conrail as of March 31, 1981.

8. All §216 money received by Conrail since March 31 has been spent in the same general categories.

9. Money received to reimburse Conrail's loss on Operations, along with cash generated by Operations, is used to meet day-to-day operating expenses. A specific accounting of the final use of each federal dollar allocated to that category would therefore be impossible.

_____

RICHARD SEMERAD

Sworn to and subscribed before me this 10th day of September, 1981.

_____

Notary Public

EXHIBIT A

- CONRAIL BORROWED $3,200,000 FROM USRA THROUGH 3/31/81.
- FROM THESE BORROWINGS, THE FOLLOWING EXPENDITURES WERE MADE:

	THROUGH 3/31/81
TRACK REHABILITATION	$1,453
A&I WORK	463
INSTALLMENT OF EQUIP. DEBT	610
EQUIPMENT IMPROVEMENTS	197
CASH LOSS ON OPERATIONS	631
PROPERTY SALES & OTHER ITEMS	(154)
TOTAL BORROWINGS	$3,200

Exhibit A

CONSOLIDATED RAIL CORPORATION

SENIORITY ROSTER 1980

ENGINE SERVICE — SENIORITY DISTRICT "G"

Rank	Employee Name		Employee Number	Prior RR	Prior Rights Roster	Prior Seniority Date	Conrail Fireman Date	Conrail Engineer Date
937	Klinger	BF	066066	PC	0028	11/04/42	4/01/76	4/01/76
938	Zeigler	BH	066624	PC	0028	11/04/42	4/01/76	4/01/76
939	Miller	JP	864561	RDG	0002	11/10/42	4/01/76	4/01/76
940	Wells	HJ	864563	RDG	0002	11/10/42	4/01/76	4/01/76
941	Marter	CA	066151	PC	0028	11/11/42	4/01/76	4/01/76
942	Casey	JJ	022847	PC	0029	11/18/42	4/01/76	4/01/76
943	Lindstrom	JH	025310	PC	0029	11/18/42	4/01/76	4/01/76
944	Jones	TE	087391	PC	0012	11/21/42	4/01/76	4/01/76
945	Owens	WF	046201	PC	0013	11/24/42	4/01/76	4/01/76
946	Harrison	WE	087293	PC	0012	12/02/42	4/01/76	4/01/76
947	Campbell	J	024839	PC	0029	12/04/42	4/01/76	4/01/76
948	Patterson	FG	853453	LV	0003	12/12/42	4/01/76	4/01/76
949	Mitchell	JS	087619	PC	0012	12/14/42	4/01/76	4/01/76
950	Jefferies	JW	066000	PC	0028	12/16/42	4/01/76	4/01/76
951	Terrasi	LJ	023161	PC	0029	12/21/42	4/01/76	4/01/76
952	Boyd	LJ	086907	PC	0012	12/22/42	4/01/76	4/01/76
953	Schoffner	RE	864566	RDG	0001	12/23/42	4/01/76	4/01/76
954	Mignanelli	A	023024	PC	0029	12/23/42	4/01/76	4/01/76
955	Walter	PE	025838	PC	0029	12/28/42	4/01/76	4/01/76
956	Krout	DB	087465	PC	0012	12/28/42	4/01/76	4/01/76
957	Kasson	TD	025220	PC	0029	12/28/42	4/01/76	4/01/76
958	Warrenfeltz	MG	087999	PC	0012	12/31/42	4/01/76	4/01/76
959	Clayton	RO	024880	PC	0029	1/11/43	4/01/76	4/01/76
960	Cominski	WE	024894	PC	0029	1/14/43	4/01/76	4/01/76
961	Swisher	WD	066514	PC	0028	1/14/43	4/01/76	4/01/76
962	Wicks	SW	876533	CNJ	0002	1/15/43	4/01/76	4/01/76
963	Schuster	S	023132	PC	0029	1/22/43	4/01/76	4/01/76
964	Dressler	GH	853435	LV	0003	1/30/43	4/01/76	4/01/76
965	Haverty	AP	082180	PC	0011	2/02/43	4/01/76	4/01/76
966	Franchino	D	896770	EL	0488	2/03/43	4/01/76	4/01/76
967	Maguire	RT	046022	PC	0013	2/11/43	4/01/76	4/01/76
968	Sipple	JP	892343	EL	0488	2/11/43	4/01/76	4/01/76
969	Lobichusky, Sr.	JJ	025316	PC	0029	2/12/43	4/01/76	4/01/76
970	Jobes	FC	031043	PC	0014	2/16/43	4/01/76	4/01/76

971	Pepper	G	882142	EL	0487	2/19/43	4/01/76	4/01/76
972	Ensminger	HR	A00830	PC	0028	2/24/43	4/01/76	4/01/76
973	Armstrong, Jr.	ES	065515	PC	0028	2/24/43	4/01/76	4/01/76
974	Fuller	RD	897035	EL	0488	2/27/43	4/01/76	4/01/76
975	Donley	WB	045713	PC	0013	3/03/43	4/01/76	4/01/76
976	Lillibridge	LS	010003	EL	0494	3/03/43	4/01/76	4/01/76
977	Russ	CH	025631	PC	0029	3/06/43	4/01/76	4/01/76
978	Sulzbach	HC	W00226	EL	0494	3/08/43	4/01/76	4/01/76
979	Gore	CE	W00227	EL	0494	3/09/43	4/01/76	4/01/76
980	Duryea	EH	W00228	EL	0494	3/16/43	4/01/76	4/01/76
981	Magee	J	046018	PC	0013	3/16/43	4/01/76	4/01/76
982	Post	RT	025571	PC	0029	3/23/43	4/01/76	4/01/76
983	Howell	RH	W00229	EL	0494	3/23/43	4/01/76	4/01/76
984	Heins	WA	022949	PC	0029	3/25/43	4/01/76	4/01/76
985	Ross	FR	W00230	EL	0494	3/25/43	4/01/76	4/01/76
986	Brosky	M	876614	CNJ	0002	3/28/43	4/01/76	4/01/76
987	Holloway	RL	031035	PC	0014	3/30/43	4/01/76	4/01/76
988	Martin	SS	864574	RDG	0003	3/30/43	4/01/76	4/01/76
989	Readinger	CE	864473	RDG	0002	4/21/43	4/01/76	4/01/76
990	Pardee	D	025528	PC	0029	4/26/43	4/01/76	4/01/76
991	Mullen	RJ	864978	RDG	0003	5/01/43	4/01/76	4/01/76
992	Tunney	JF	896791	EL	0493	4/01/43	4/01/76	4/01/76
993	Mulrooney	JG	897030	EL	0493	4/03/43	4/01/76	4/01/76
994	Reuther	EG	896788	EL	0493	5/07/43	4/01/76	4/01/76
995	Chickello	A	010004	EL	0493	5/08/43	4/01/76	4/01/76
996	Wetmore	H	897022	EL	0493	5/15/43	4/01/76	4/01/76
997	Karabin	G	010005	EL	0493	5/16/43	4/01/76	4/01/76
998	Millard, Jr.	CV	896776	EL	0493	5/20/43	4/01/76	4/01/76
999	Lestrange	TJ	W00231	EL	0493	6/04/43	4/01/76	4/01/76
1000	Olexy	SF	895682	EL	0493	6/09/43	4/01/76	4/01/76
1001	Burkhart	JS	895680	EL	0493	6/19/43	4/01/76	4/01/76
1002	Evans	WD	010006	EL	0493	6/25/43	4/01/76	4/01/76
1003	Scott	AC	882061	EL	0487	7/14/43	4/01/76	4/01/76
1004	Preston	JR	895681	EL	0493	7/14/43	4/01/76	4/01/76
1005	Vansiooten	H	882062	EL	0487	7/22/43	4/01/76	4/01/76
1006	Kellogg	RL	895671	EL	0493	8/04/43	4/01/76	4/01/76
1007	Balas, Jr.	PG	024748	PC	0029	8/05/43	4/01/76	4/01/76
1008	Keister, Jr.	JL	066030	PC	0028	8/10/43	4/01/76	4/01/76
1009	Bailey	GC	300102	PRSL	0003	8/10/43	4/01/76	4/01/76
1010	Sullivan, Jr.	JJ	882063	EL	0487	8/11/43	4/01/76	4/01/76
1011	Boshek	JA	895580	EL	0488	8/11/43	4/01/76	4/01/76
1012	Starling	WD	882064	EL	0487	8/13/43	4/01/76	4/01/76
1013	Hryn	JJ	025176	PC	0029	8/16/43	4/01/76	4/01/76
1014	Galanot	EL	025063	PC	0029	8/17/43	4/01/76	4/01/76

Exhibit B

CONSOLIDATED RAIL CORPORATION

SENIORITY ROSTER 1978

ENGINE SERVICE — SENIORITY DISTRICT "G"

Rank	Employee Name		Employee Number	Prior RR	Prior Rights Roster	Prior Seniority Date	Conrail Fireman Date	Conrail Engineer Date
1249	Millard Jr.	CV	896776	EL	0493	5/20/43	4/01/76	4/01/76
1250	LeStrange	TJ	W00231	EL	0493	6/04/43	4/01/76	4/01/76
1251	Olexy	SF	895682	EL	0493	6/09/43	4/01/76	4/01/76
1252	Burkhart	JS	895680	EL	0493	6/19/43	4/01/76	4/01/76
1253	Evans	WD	C10006	EL	0493	6/25/43	4/01/76	4/01/76
1254	Cohn	HS	024850	PC	0029	7/14/43	4/01/76	4/01/76
1255	Scott	AC	882061	EL	0487	7/14/43	4/01/76	4/01/76
1256	Preston	JR	895681	EL	0493	7/14/43	4/01/76	4/01/76
1257	VanSlooten	H	882062	EL	0487	7/22/43	4/01/76	4/01/76
1258	Dimarino	HJ	087082	PC	0012	7/22/43	4/01/76	4/01/76
1259	Kellogg	RL	895671	EL	0493	8/04/43	4/01/76	4/01/76
1260	Balas Jr.	PG	014748	PC	0029	8/05/43	4/01/76	4/01/76
1261	Keister Jr.	JL	066030	PC	0028	8/10/43	4/01/76	4/01/76
1262	Bailey	GC	300101	PRSL	0003	8/10/43	4/01/76	4/01/76
1263	Horan	FJ	867571	RDG	0003	8/10/43	4/01/76	4/01/76
1264	Sullivan Jr.	JJ	882063	EL	0487	8/11/43	4/01/76	4/01/76
1265	Boshek	JA	895580	EL	0488	8/11/43	4/01/76	4/01/76
1266	Stateja	JJ	031089	PC	0014	8/13/43	4/01/76	4/01/76
1267	Starling	WD	882064	EL	0487	8/13/43	4/01/76	4/01/76
1268	Hryn	JJ	025176	PC	0029	8/16/43	4/01/76	4/01/76
1269	Galanot	EL	025063	PC	0029	8/17/43	4/01/76	4/01/76
1270	Pedlock	J	C10007	EL	0511	8/23/43	4/01/76	4/01/76
1271	Smith	GC	066442	PC	0028	8/24/43	4/01/76	4/01/76
1272	Statkevicus	J	852621	LV	0003	8/30/43	4/01/76	4/01/76
1273	Thurston	WS	025802	PC	0029	8/31/43	4/01/76	4/01/76
1274	Johnston	RM	066004	PC	0028	9/07/43	4/01/76	4/01/76
1275	Williams	RE	864437	RDG	0002	9/08/43	4/01/76	4/01/76
1276	Regan	TG	895685	EL	0493	9/09/43	4/01/76	4/01/76
1277	Deprimo	CA	895666	EL	0493	9/09/43	4/01/76	4/01/76
1278	Tompkins	AR	852622	LV	0003	9/15/43	4/01/76	4/01/76

1279	Baginski	EF	022811	PC	0029	10/11/43	4/01/76	4/01/76
1280	Adams	WB	W00232	EL	0494	10/11/43	4/01/76	4/01/76
1281	Burke	JJ	024824	PC	0029	10/12/43	4/01/76	4/01/76
1282	Latini	MB	W00233	EL	0494	10/20/43	4/01/76	4/01/76
1283	Latini	GJ	W00234	EL	0494	10/22/43	4/01/76	4/01/76
1284	Bottum	GL	864595	RDG	0003	10/25/43	4/01/76	4/01/76
1285	Ganser	R	876491	CNJ	0002	10/27/43	4/01/76	4/01/76
1286	Kunkle	KH	852257	LV	0001	10/28/43	4/01/76	4/01/76
1287	Crane	R	885296	EL	0487	11/03/43	4/01/76	4/01/76
1288	Renn	VS	864597	RDG	0003	12/01/43	4/01/76	4/01/76
1289	Vandermark	CE	885286	EL	0487	12/02/43	4/01/76	4/01/76
1290	Donahue Jr	D	851665	CNJ	0002	12/04/43	4/01/76	4/01/76
1291	Zechman	AA	864600	RDG	0003	12/21/43	4/01/76	4/01/76
1292	Hartley	DC	853442	LV	0003	12/29/43	4/01/76	4/01/76
1293	Batz	RN	024766	PC	0029	12/31/43	4/01/76	4/01/76
1294	Lutzko Jr	J	876612	CNJ	0002	1/06/44	4/01/76	4/01/76
1295	Brommer	CF	865146	RDG	0002	1/06/44	4/01/76	4/01/76
1296	Murray	JM	025459	PC	0029	1/07/44	4/01/76	4/01/76

Exhibit C

CONSOLIDATED RAIL CORPORATION

ROSTER OF ENGINEERS

(Former Erie-Susquehanna 2nd Sub Divn.)

HOBOKEN 3RD SUB DIVISION

Rank No.		Name	Acc't. No.	Birth Date	Entered Service	Date Promoted Engineer
1.	FA	G. Hazleton, Jr.		10/30/19	8/24/41	12/11/56
2.		D. T. Maltby	882158	10/02/19	8/28/41	12/13/56
3.	FA	E. J. Ruefer		10/20/15	10/29/41	12/14/56
4.		W. R. Olver	884651	6/22/22	7/27/42	3/27/57
5.		A. H. Maillet, Jr.	883361	10/08/17	10/27/42	4/01/57
6.	FA	H. C. Sulzbach		10/25/14	3/08/43	4/03/57
7.		C. E. Gore	885381	6/15/17	3/09/43	10/24/60
8.	FA	F. R. Ross	882161	11/12/13	3/25/43	10/28/60
9.	FA	W. B. Adams	885880	7/02/16	10/11/43	11/08/60
10.		M. B. Latini	882163	11/13/19	10/20/43	11/09/60
11.		G. J. Latini	882162	6/07/18	10/22/43	11/10/60
12.		R. A. Moureaux	882160	10/14/12	1/15/44	11/11/60
13.		D. W. Mosher	885093	1/20/25	6/28/45	11/14/60
14.		D. C. Engelhart	883365	1/26/26	5/12/59	3/14/64
15.		J. W. Bogach	882038	8/01/36	5/15/59	3/14/64
16.		E. D. Mosher, Jr.	888755	10/16/34	7/10/59	3/14/64
17.		O. R. Swingle	882940	4/19/28	10/01/59	3/14/64
18.		J. G. Davis	884599	12/05/32	12/18/59	3/14/64
19.		T. H. McKeeby	882942	4/19/38	5/07/60	2/27/65

ROSTER OF ENGINEERS
FORMER LACKAWANNA — SCRANTON DIVN.
HOBOKEN 2ND SUB. DIVN.

Rank No.		Name	Acc't. No.	Entered Service	Date Promoted Engineer	Seniority Del. Divn.
20.		J. F. Tunney	896791	5/01/43	8/05/55	10/17/60
21.		E. J. Ruether	896788	5/07/43	8/09/55	10/17/60
22.		H. Wetmore	897022	5/15/43	8/11/55	10/17/60
23.		C. V. Millard	896776	5/20/43	10/04/55	10/17/60
24.	FA	T. J. Lestrange		6/04/42	10/04/55	10/17/60
25.		S. F. Olexy	895682	6/09/43	10/04/55	10/17/60
26.		J. R. Preston	895681	7/14/43	12/07/55	10/17/60
27.		T. Regan	895685	9/09/43	12/19/55	10/17/60
28.		C. DePrimo	895666	9/09/43	12/19/55	10/17/60

Exhibit D

Commonwealth of Pennsylvania :
: ss
County of Lackawanna :

I, THOMAS J. LeSTRANGE, hereby swear and affirm the following:

1. In 1970, I took a leave of absence from the Erie Lackawanna Railroad.

2. Prior to that time, and subsequent to that leave of absence, I was part of the collective bargaining agreement made by the Erie Lackawanna and my union.

3. From 1976 through 1981, I have been on the seniority rosters of ConRail.

4. To the best of my knowledge, I am now subject to the collective bargaining agreement between ConRail and my union.

_____
Thomas J. LeStrange

Sworn to and subscribed
before me this 25th day
of September, 1981.

_____
Notary Public

Commonwealth of Pennsylvania :
: ss:
County of Philadelphia :

AFFIDAVIT OF JAMES P. LEACH

I, JAMES P. LEACH, having been duly sworn according to law, depose and say:

1. I am Director — Title V Administration for Consolidated Rail Corporation with offices at 1234 Six Penn Center Plaza, Philadelphia, a position I have held since December, 1979. In that capacity I am responsible for the implementation and monitoring of the labor protection program established by Title V of the Regional Rail Reorganization Act, as amended.

2. Prior to becoming Director, I was Acting Director beginning in August, 1978. During 1977 I functioned as Manager — Title V Administration. I have spent 40 years actively involved in labor relations in the railroad industry. From my background I am generally familiar with the manner in which Conrail has implemented Title V.

3. In accordance with the requirements of Section 502(b) of the Regional Rail Reorganization Act of 1973 Conrail extended an offer of continuity of the employment relationship effective April 1, 1976 to *each* employee of "a railroad in reorganization in the region," as defined in Section 102(14) and (15) of the Rail Act (and including the Erie-Lackawanna Railroad), who had not already accepted employment with the United States Railway Association. Conrail construed these offers to be accepted unless rejected in writing. Attached is an accurate copy of the notice of continuation of employment sent to people absent because of disability or on leave of absence. A copy of this letter was sent to Thomas LeStrange.

4. Conrail construed these offers as an offer of an employment relationship rather than an offer of active employment because the number of employees of the railroads in reorganization greatly exceeded the number of positions available with Conrail. Basically, these offers did not change any employee's status on April 1, 1976 — active employees remained as active employees, furloughed employees continued in that status, and employees absent due to disability or leave of absence continued in their respective states. Statistically this meant that Conrail had 149,498 employees as of April 1, 1976. However, attachment 2 to this Affidavit, I.C.C. Wage Statistics Form B which Conrail is required to submit to the I.C.C., shows that only between 94,000 and 100,429 employees were actively employed in April of 1976.

5. Subsequent to April 1, 1976, as Conrail began to consolidate its workforce, active employees were put into surplus status, that is they did not work. Statistically, this is reflected in attachment 3 to this Affidavit which is a copy of I.C.C. Wage Statistics Form B which shows that in calendar year 1980, Conrail had between 79,574 and 85,182 active employees.

6. Conrail received no money from the Federal Government pursuant to Section 509 of the Rail Act for costs of administration of Title V. Nor has Conrail used any money potentially available under Title V for training costs referred to in Section 509. Such funding for training was only available as of October 1, 1980, when the Staggers Rail Act was passed and shortly thereafter it became apparent that Title V would be repealed. This repeal was effective September 1, 1981. The money

available under Title V was used to reimburse Conrail for benefits paid to or for the benefit of employees pursuant to Section 505 of the Rail Act.

JAMES P. LEACH

Sworn to and subscribed
before me this 2nd day
of October, 1981.

Notary Public

February 26, 1976

NOTICE

TO: Employees represented by labor organizations on the following properties:

Ann Arbor Railroad Company, The Central Railroad Company of New Jersey, Chicago River and Indiana Railroad Company, Dayton Union Railway Company, Erie Lackawanna Railway Company, Indianapolis Union Railway Company, Ironton Railroad Company, Lehigh and Hudson River Railway Company, Lehigh and New England Railway Company, Lehigh Valley Railroad Company, The New York and Long Branch Railroad Company, Penn Central Transportation Company (except employees of Canada Southern), Pennsylvania-Reading Seashore Lines, Peoria and Eastern Railway Company, Raritan River Railroad Company, Reading Company, Union Depot Company, Columbus, Ohio.

Effective April 1, 1976, rail properties of railroads in reorganization and certain of their subsidiaries as designated in the United States Railway Association's Final System Plan will be conveyed to Consolidated Rail Corporation (hereinafter referred to as "ConRail"). ConRail will assume jurisdiction over the operation and control of certain properties conveyed in accordance with the provisions of the Regional Rail Reorganization Act of 1973 (PL 93-236), as amended.

As provided for in Section 502(b) of the Regional Rail Reorganization Act and Article II(a) of the Single Implementing Agreement dated July 23, 1975, between ConRail and participating labor organizations, all employees actively employed on the above named properties, who have not accepted employment with a railroad acquiring property pursuant to the Final System Plan, are hereby offered employment with ConRail to become

effective on the date of conveyance, April 1, 1976. This offer of employment is in the same class or craft in which you are actively employed, and you will not lose any seniority held in any other craft or class on the ConRail System.

This offer of employment will be considered as having been automatically accepted unless you specifically decline by written notice to Mr. A. E. Egbers, Vice President-Labor Relations, Consolidated Rail Corporation, 1818 Market Street, Fifteenth Floor, Philadelphia, Pennsylvania 19103 not later than March 15, 1976.

Unless otherwise advised, employees who accept employment with ConRail and who are working on rail properties being conveyed to ConRail shall be assigned to the same positions on the day of conveyance, April 1, 1976, that they held immediately prior to such date, and will report at the same time and same location and work under their respective collective bargaining agreements.

If employees' jobs are to be abolished incident to the conveyance or discontinuance of service under the provisions of the Act, or otherwise will not be available to them, further notice will be given to such employees and they may exercise seniority under the rules in effect for the class or craft in which they are working.

Richard D. Spence
President and Chief
Operating Officer

Form Title V-1

February 26, 1976

Enclosed is a copy of my notice dated February 26, 1976 offering employment to all employees of railroads in reorganization and certain of their subsidiary properties which are being conveyed to the Consolidated Rail Corporation (ConRail) under the Final System Plan issued by the United States Railway Association in accordance with the Regional Rail Reorganization Act of 1973, as amended.

The records indicate that you are presently on an authorized leave of absence, or absent because of disability.

This is to advise that your employment relationship, including seniority, will be automatically transferred to ConRail as of the date of conveyance, unless you accept an offer of employment with an acquiring railroad or do not desire to establish an employment relationship with ConRail and so advise, in writing, Mr. A. E. Egbers, Vice President-Labor Relations, 1818 Market Street, Fifteenth Floor, Philadelphia, Pennsylvania 19103.

Very truly yours,

Richard D. Spence
President and Chief
Operating Officer

Form Title V-4

Form Approved, Budget Bureau No. 42-R010

I. C. C. WAGE STATISTICS Form B

MONTHLY REPORT OF EMPLOYEES, SERVICE, AND COMPENSATION—Continued

Full name of reporting company CONRAIL

Month of APRIL, 19 26
For calendar year ____, 19__
(Blanks Are Void)

Schedule No.	Reporting Division	Number on Subsistence Books at Close of Month	Number of Employees Who Served Part Time During the Month	Service Hours: Employees Paid Actual Service	Service Hours: Employees Paid Pay	Service Hours: Overtime Paid For	Service Hours: Compensated Absences, Allowances and Vacations and Holidays	Service Hours: Total	Line No.
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	
	VI (b). TRANSPORTATION (YARD AND SERVICE)								
101	Road passenger conductors	793	835	103 359	121 384	19 810	33 376	224 570	101
102	Assistant road passenger conductors and ticket collectors	1 056	1 202	119 748	221 029	31 730	38 547	291 306	102
103	Road freight conductors (through freight)	1 577	1 699	239 165	349 148	19 486	136 186	495 820	103
104	Road freight conductors (local and way freight)	928	934	151 055	172 225	35 873	34 471	244 569	104
105	Road passenger baggagemen	87	88	10 555	17 694	1 220	1 985	30 949	105
106	Road passenger brakemen and flagmen	254	265	32 062	48 654	4 194	9 990	62 838	106
107	Road freight brakemen and flagmen (through freight)	3 519	3 947	469 965	669 310	38 000	263 266	970 576	107
108	Road freight brakemen and flagmen (local and way freight)	1 904	1 920	294 727	336 478	69 654	64 461	470 593	108
109	Yard conductors and yard foremen	3 575	3 686	541 616	551 721	75 809	110 298	737 819	109
110	Yard brakemen and yard helpers	6 858	7 347	949 681	966 362	141 488	168 222	1 276 072	110
111	Road passenger engineers and motormen	855	887	110 287	188 931	26 378	27 350	342 659	111
112	Road freight engineers and motormen (through freight)	1 857	2 047	277 793	387 001	25 749	147 029	561 779	112
113	Road freight engineers and motormen (local and way freight)	989	991	145 928	162 352	36 135	41 554	240 041	113
114	Yard engineers and motormen	3 080	3 310	486 241	493 954	72 397	99 747	666 098	114
115	Road passenger firemen and helpers	425	477	49 253	82 106	9 614	13 495	104 375	115
116	Road freight firemen and helpers (through freight)	1 143	1 179	132 432	193 734	10 741	49 408	274 083	116
117	Road freight firemen and helpers (local and way freight)	533	544	71 698	80 316	17 250	19 898	117 964	117
118	Yard firemen and helpers	1 442	1 514	205 434	208 911	32 042	36 115	277 068	118
(100)	Total (transportation—train and engine)	30 895	32 822	4 390 699	5 294 340	667 611	1 316 598	7 228 519	(100)
(102)	TOTAL, ALL GROUPS (Divisions 901 - 908)	94 487	100 429						(102)

Schedule No.	Reporting Division	Compensation*: Employees Paid Pay	Compensation*: Overtime Paid For	Compensation*: Compensated Absences, Allowances and Vacations and Holidays	Compensation*: Total	Miles: Revenue Road	Miles: Road not own and Rent	Train Miles of Trains not Wholly Over Line: Revenue Freight	Line No.
		(i)	(j)	(k)	(l)	(m)	(n)	(o)	
	VI (b). TRANSPORTATION (YARD AND SERVICE)—Continued								
101	Road passenger conductors	1 117 635	126 336	214 936	1 458 907	2 726 774	505 614	18 880	101
102	Assistant road passenger conductors and ticket collectors	1 273 823	179 847	221 569	1 675 249	3 442 442	800 233	24 013	102
103	Road freight conductors (through freight)	2 036 657	183 042	818 309	3 038 008	4 001 014	268 349	29 993	103
104	Road freight conductors (local and way freight)	1 094 802	35 031	232 890	1 680 723	1 652 139	504 828	19 073	104
105	Road passenger baggagemen	167 766	2 012	11 164	125 942	323 270	18 487	1 276	105
106	Road passenger brakemen and flagmen	315 633	31 523	62 301	409 507	743 096	96 735	5 932	106
107	Road freight brakemen and flagmen (through freight)	3 631 518	344 491	1 431 813	5 389 822	7 913 732	489 452	58 565	107
108	Road freight brakemen and flagmen (local and way freight)	1 955 506	628 012	374 999	2 958 517	3 258 875	945 139	37 060	108
109	Yard conductors and yard foremen	4 009 533	822 225	792 126	5 623 884	• • •	• • •	69 105	109
110	Yard brakemen and yard helpers	6 580 048	1 437 236	1 132 131	9 149 415	• • •	• • •	121 697	110
111	Road passenger engineers and motormen	1 376 792	168 111	194 843	1 733 746	2 715 558	134 015	19 534	111
112	Road freight engineers and motormen (through freight)	2 793 037	283 311	1 054 356	4 130 704	4 517 807	377 612	36 409	112
113	Road freight engineers and motormen (local and way freight)	1 186 227	347 472	302 482	1 836 186	1 489 156	565 186	18 742	113
114	Yard engineers and motormen	3 902 695	854 253	782 226	5 539 173	• • •	• • •	63 120	114
115	Road passenger firemen and helpers	601 718	58 738	91 044	751 500	1 330 665	51 086	9 115	115
116	Road freight firemen and helpers (through freight)	1 681 111	96 687	428 517	1 706 315	2 234 993	158 502	12 157	116
117	Road freight firemen and helpers (local and way freight)	502 231	161 005	124 820	788 056	738 924	272 297	9 407	117
118	Yard firemen and helpers	1 484 359	249 451	239 612	1 973 422	• • •	• • •	25 283	118
(100)	Total (transportation—train and engine)	33 943 151	6 433 787	8 509 138	49 988 016	37 091 250	5 211 987	585 861	(100)

*The corresponding figures in this report include employees' contributions, but exclude taxes paid by the railroad for old age retirement and unemployment insurance.

Speed basis for computing pay on respondent's road: Passenger 20 M P H; Freight 12 M P H

I. C. C. WAGE STATISTICS Form B

MONTHLY REPORT OF EMPLOYEES, SERVICE, AND COMPENSATION—Continued

Full name of reporting company Consolidated Rail Corp.

Month of _____, 19__
For calendar year Annual, 1982

Occupation No.	Reporting Divisions	Hours on Duty Service Hours or Miles	Hours on Duty Not Service But Chargeable Time (Explain Briefly) (See Instructions)	Service Hours: Straight Time Actually Worked	Service Hours: Straight Time Paid For	Service Hours: Overtime Paid For	Service Hours: Constructive Allowances, Lieu Time and Vacations and Holidays	Service Hours: Total	Base Hourly Rate
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	
	VI (b). Transportation (train and engine)								
111	Road passenger conductors	815	843	1 240 690	2 074 041	234 888	548 463	2 855 192	111
112	Assistant road passenger conductors and ticket collectors	1 219	1 266	1 589 192	2 914 489	369 259	731 241	4 014 989	112
113	Road freight conductors (through freight)	1 389	1 433	2 127 436	3 434 719	198 710	1 325 776	4 809 204	113
114	Road freight conductors (local and way freight)	895	902	1 586 994	1 835 707	346 871	652 379	2 835 352	114
115	Road passenger baggagemen	90	92	141 162	224 937	15 369	56 000	296 306	115
116	Road passenger brakemen and flagmen	149	154	206 016	335 944	31 312	127 143	494 999	116
117	Road freight brakemen and flagmen (through freight)	2 898	3 135	4 143 232	6 204 746	338 593	2 590 083	9 133 422	117
118	Road freight brakemen and flagmen (local and way freight)	1 821	1 859	2 935 501	3 421 733	675 359	1 128 923	5 230 615	118
119	Yard conductors and yard foremen	2 533	2 556	4 340 145	4 358 466	428 479	1 034 486	5 821 431	119
120	Yard brakemen and yard helpers	4 355	4 428	6 876 734	6 897 407	707 449	1 544 330	9 149 186	120
121	Road passenger engineers and motormen	848	878	1 338 491	2 284 041	304 329	419 324	3 008 194	121
122	Road freight engineers and motormen (through freight)	1 588	1 652	2 463 344	3 612 797	238 291	1 372 598	5 223 688	122
123	Road freight engineers and motormen (local and way freight)	701	755	1 319 261	1 527 488	312 182	532 903	2 371 823	123
124	Yard engineers and motormen	2 307	2 340	4 001 423	4 042 561	480 818	959 719	5 483 104	124
125	Road passenger firemen and helpers	400	436	577 446	773 938	88 968	133 629	1 196 615	125
126	Road freight firemen and helpers (through freight)	868	941	1 249 742	1 945 410	91 339	499 238	2 636 487	126
127	Road freight firemen and helpers (local and way freight)	383	394	662 249	777 378	139 097	235 556	1 152 631	127
128	Yard firemen and helpers	1 066	1 094	1 784 788	1 797 366	188 406	346 965	2 333 725	128
(009)	Totals (transportation—train and engine)	24 366	25 142	38 452 616	48 441 336	5 218 801	14 314 415	68 004 529	(009)
(010)	TOTAL, ALL GROUPS (Divisions 001 - 005)	78 636	81 182						(010)

Occupation No.	Reporting Divisions	Compensation: Straight Time Paid For	Compensation: Overtime Paid For	Compensation: Constructive Allowances, Lieu Time and Vacations and Holidays	Compensation: Total	Miles: Actually Run	Miles: Paid for but not Run	Miles: Total Number of Trips Over Which Miles Taken, Trips + Miscellaneous But Not Paid	Base Hourly Rate
		(9)	(10)	(11)	(12)	(13)	(14)	(15)	
	VI (b). Transportation (train and engine)—Continued								
111	Road passenger conductors	19 556 790	2 181 632	5 100 225	26 837 647	33 622 189	5 538 444	246 239	111
112	Assistant road passenger conductors and ticket collectors	26 614 562	3 206 790	6 327 554	35 148 906	46 529 464	9 455 095	320 665	112
113	Road freight conductors (through freight)	29 751 349	3 743 376	12 138 874	44 613 599	36 509 919	3 661 619	488 284	113
114	Road freight conductors (local and way freight)	18 128 299	2 292 133	6 150 017	26 570 449	15 129 224	7 783 534	203 467	114
115	Road passenger baggagemen	1 921 181	156 963	443 991	2 521 135	4 017 212	648 728	23 404	115
116	Road passenger brakemen and flagmen	2 871 721	206 434	1 067 121	4 135 466	5 273 228	846 047	38 054	116
117	Road freight brakemen and flagmen (through freight)	54 228 707	4 296 281	21 035 501	79 610 489	71 600 521	5 491 305	543 084	117
118	Road freight brakemen and flagmen (local and way freight)	32 335 468	3 178 456	9 923 556	51 437 480	28 976 709	13 902 642	380 209	118
119	Yard conductors and yard foremen	47 204 858	6 571 346	10 691 976	64 468 180	• • • • • • •	• • • • • • •	556 716	119
120	Yard brakemen and yard helpers	72 361 632	10 274 689	15 095 449	97 731 760	• • • • • • •	• • • • • • •	881 775	120
121	Road passenger engineers and motormen	24 141 143	2 503 992	4 550 184	31 395 319	32 126 779	1 342 966	220 447	121
122	Road freight engineers and motormen (through freight)	37 649 022	3 696 767	13 930 676	55 276 563	39 854 476	4 976 345	337 520	122
123	Road freight engineers and motormen (local and way freight)	16 437 259	4 862 067	5 508 914	26 808 242	12 756 911	6 374 457	174 812	123
124	Yard engineers and motormen	46 562 515	7 939 805	10 604 199	65 106 519	• • • • • • •	• • • • • • •	517 233	124
125	Road passenger firemen and helpers	10 338 394	738 538	1 427 830	12 504 762	14 483 506	348 013	94 461	125
126	Road freight firemen and helpers (through freight)	18 519 677	1 234 022	4 309 731	24 063 930	21 700 761	2 422 228	171 669	126
127	Road freight firemen and helpers (local and way freight)	7 632 008	1 088 491	2 136 332	11 667 791	6 833 733	2 396 094	87 640	127
128	Yard firemen and helpers	18 743 661	2 702 829	3 818 806	25 265 296	• • • • • • •	• • • • • • •	196 672	128
(009)	Totals (transportation—train and engine)	479 917 170	70 010 955	134 720 336	684 648 461	376 412 632	64 743 923	6 077 746	(009)

Speed basis for computing pay on respondent's road: Passenger 20 MPH; Freight 12 1/2 MPH

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2943

THOMAS LE STRANGE,
Appellant

v.

CONSOLIDATED RAIL CORPORATION,
Appellee

Appeal from the United States District Court for the Middle District of Pennsylvania

(D.C. No. 78-0944)

Submitted June 8, 1982

Before: ADAMS and WEIS, *Circuit Judges* and BLOCH*, *District Judge*

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* The Honorable Alan Bloch, United States District Judge for the Western District of Pennsylvania, sitting by designation.

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

BLOCH, *District Judge*.

Plaintiff brought suit, pursuant to §504 of the Rehabilitation Act of 1973, claiming he was denied employment by the defendant because he is handicapped. Sec-

tion 504, 29 U.S.C. §794, provides: "No otherwise qualified handicapped individual . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." Although the lower court dismissed plaintiff's action because he lacked standing to bring his suit, we think the question posed by this appeal is, in fact, whether §504's prohibition against discrimination by federal grantees encompasses a ban against employment discrimination.

I

The lower court concluded plaintiff did not have standing to sue defendant for employment discrimination "unless 1) providing emplovment is a primary objective of the federal aid received by the defendant, or 2) discrimination in employment necessarily causes discrimination against primary beneficiaries of the federal aid." *LeStrange v. Consolidated Rail Corp.*, No. 78-0944 (M.D. Pa. Oct. 20, 1981). The court further refined the first prong of its standing test to require the plaintiff to show he is a primary beneficiary of the federal aid received by the defendant, and that the primary objective of the federal aid be to create new jobs, and not merely to maintain employment or to compensate for lost jobs. Plaintiff could not meet either of the two prongs of the lower court's standing test.

This standing test had its genesis in the case of *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978). The *Trageser* analysis has since been adopted by the Eight Circuit in *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (1980), the Second Circuit in *United States v. Cabrini Medical Center*, 639 F.2d 908 (1981), and the Ninth Circuit in *Scanlon v. Atascadero State Hospital*, No. 80-5201 (May 24, 1982). *Trageser* and its progeny rely on §505(a)(2) of the Reha-

bilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, amending the Rehabilitation Act of 1973, which provides:

> "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such. . . ."

29 U.S.C. §794a(a)(2).

Title VI served as the model for §504 of the Rehabilitation Act. Section 601 of Title VI provides:

> "No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 U.S.C. §2000d.

Section 602 of Title VI authorizes federal departments and agencies to promulgate regulations to enforce §601's prohibition against discrimination, including regulations providing for the termination of federal funding in the event of non-compliance, *id.*, §2000d-1. However, §604 provides:

> "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment."

Id., §2000d-3.

Trageser concludes, first, that §604 limits not only agency action, but also the actions of private litigants. It then concludes that the remedies, procedures and rights of Title VI extended to the victims of handicap discrimination by the 1978 amendments to the Rehabilitation

Act includes §604's limitation on the right to bring an action for employment discrimination.

The lower court reformulated the *Trageser* holding into a test for standing, peculiar to §504 actions. We see no reason to formulate any test for standing for §504 actions other than that promulgated by the Supreme Court for general application, that is (a) does the plaintiff allege "that the challenged action has caused him injury in fact, economic or otherwise"; and (b) "[is] the interest sought to be protected by the complainant . . . arguably within the zone of interest [sought] to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150, 152-53 (1970). The relevant question on this appeal would then be whether plaintiff's interest in being free from employment discrimination falls within the zone of interests sought to be protected by §504. However, the correct formulation of the test for standing for §504 actions is not the crucial issue presented by this appeal. For however the test is formulated, the crucial issue is whether §504, as amended in 1978, covers employment discrimination against the handicapped by federal grantees.

II

The Supreme Court recently confronted this same issue within the context of Title IX of the Education Amendments of 1972, and we believe its approach in *North Haven Board of Education v. Bell*, 50 U.S.L.W. 4501 (May 17, 1982), dictates our approach in this case.

Section 901(a) of Title IX, like §504 of the Rehabilitation Act, is modeled after §601 of Title VI of the Civil Rights Act. It provides:

> "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

education program or activity receiving Federal financial assistance. . . ."

The Department of Education promulgated regulations pursuant to Title IX, prohibiting federally funded education programs from discriminating in employment on the basis of gender. Two Connecticut public school boards brought separate suits challenging its authority to issue the regulations, arguing Title IX was not meant to reach the employment practices of educational institutions.

The Supreme Court began its analysis by focusing on the statutory language, concluding first that "[A] female employee who works in a federally funded education program is 'subjected to discrimination under' that program if she is paid a lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are her male colleagues," *id.*, at 4503, and, therefore, that, "Because §901(a) neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these 'persons' unless other considerations counsel to the contrary," *id.* To determine whether "other considerations counsel to the contrary," the Supreme Court looked to the legislative history "for evidence as to whether Congress meant somehow to limit the expansive language of §901," *id.* The Court found no such evidence and held, "Title IX proscribes employment discrimination in federally funded education programs," *id.* at 4507.

III

The statutory language of §504 of the Rehabilitation Act and §901 of Title IX being virtually identical, we are bound to conclude, like the Supreme Court in *North Haven*, that because §504 "neither expressly nor impliedly

excludes employees from its reach, we should interpret the provisions as covering and protecting these 'persons' unless other considerations counsel to the contrary." For like female employees, handicapped employees are "subjected to discrimination under" a federally funded program if they are paid lower salaries, given less opportunity for promotion, or forced to work under more adverse conditions than are their non-handicapped colleagues. Similarly, a handicapped individual is certainly "subjected to discrimination under" a federally funded program if, as alleged in our case, he is not hired at all, solely because of his handicap.

Of course, *Trageser* and the courts which have followed it, including the lower court in this case, find counsel to the contrary in §505(a)(2) of the 1978 amendments to the Rehabilitation Act, extending the remedies, procedures and rights of Title VI to victims of handicap discrimination. Title IX contains no provision similar to §505(a)(2). *Trageser* would also argue that §505(a)(2) should be read together with §505(a)(1), 29 U.S.C. §794a(a)(1), extending the remedies, procedures and rights of Title VII to victims of handicap discrimination by the federal government. The failure of Congress to extend Title VII to victims of discrimination by federal grantees indicates to the *Trageser* court its intention to limit the scope of §504 to discrimination other than employment discrimination. We do not believe that the statutory language of §505(a)(2), even when read in the context of §505(a)(1), indicates a desire to narrow the scope of §504. For this reason, we would nonetheless find §504 prohibits employment discrimination by federal grantees unless anything in the legislative history of either §504 or §505(a)(2) counsels to the contrary.

Section 505(a)(2) extends the remedies, rights and procedures of Title VI to (1) persons; (2) aggrieved by any act or failure to act by either a recipient or a provider of federal funds. Title VI consists of six provisions,[1] and

1. The first provision of Title VI, §601, 42 U.S.C. §2000-d, is the declaration prohibiting discrimination on the basis of race, color or national origin by federal grantees. The second provision, §602,

the only one which extends to *persons* any rights or remedies is §603, 42 U.S.C. §2000d-2, providing for judicial review of agency action.

The plain words of §604 limit its application to departments or agencies. Given the statutory scheme of which Title VI is a part, it is not illogical to assume Congress intended precisely what it said and no more. Title VI is, of course, a part of the 1964 Civil Rights Act. The 1964 Civil Rights Act also has a Title VII which deals exclusively with employment discrimination. In 1964, it prohibited employment discrimination on the basis of race, color or national origin by *any* employer with 15 or more employees working each working day for at least 20 weeks. Obviously, the sweep of Title VII is far broader than Title VI. Clearly, Title VI was never meant to be a prime tool for the enforcement of employment rights.

Title VII created a new federal agency, the Equal Employment Opportunity Commission, to battle employment discrimination. Without the limiting language of §604, Title VI threatened to engage every other department and agency in the same battle, with the potential danger of varying rules, regulations and strategies.

The question of whether §604 also limited the rights of private litigants was unlikely to even occur to the Congress. The only reason for a private litigant to sue for employment discrimination under Title VI is that

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id. §2000d-1, authorizes federal departments and agencies to issue rules, regulations and orders to effectuate the initial prohibition against discrimination. Section 602 also provides that compliance with the regulations may be effected by the termination of federal funding. It further provides for a number of procedures clearly designed, not to protect the victim of discrimination, but the federal grantee. Section 603, *id.* §2000d-2, provides for judicial review of agency action. Section 604, *id.* §2000d-3, prohibits any department or agency from terminating funds for employment discrimination unless a primary goal of the federal program involved is to provide employment. Section 605, *id.* §2000d-4, exempts from the scope of Title VI programs which receive federal financial assistance by way of a contract of insurance or guaranty.

he failed to meet the administrative requirements to bringing suit under Title VII. Even then, an action brought pursuant 42 U.S.C. §1983 may provide a wider range of remedies than a Title VI action.[2]

As to the implications raised by §505(a)(1), extending the remedies, procedures and rights of Title VII to victims of discrimination by the federal government, closer analysis undermines the *Trageser* argument that this too indicates Congressional intent to limit §504 to discrimination other than employment discrimination.

Section 505(a)(1) extends particular provisions of Title VII to individuals aggrieved by the final disposition of a complaint brought pursuant to §501 of the Rehabilitation Act. Section 501 requires federal departments, agencies and instrumentalities, including the Postal Service, to develop an affirmative action plan for the hiring, placement and advancement of handicapped individuals. Handicapped employees or prospective employees aggrieved by agency action or inaction may file a complaint with the agency. The particular provisions of Title VII referred to in §505(a)(1) extend to complaining individuals the right to appeal an adverse agency decision to the EEOC and then to bring a civil action in court. The various provisions prescribe various time limitations on agency action and the filing of appeals and civil suits. They further proscribe various court procedures.

Section 505(a)(1) refers alleged victims of employment discrimination on the basis of handicap in the federal government to the very sections of Title VII dealing with employment discrimination on the basis of race, color, religion, sex or national origin in the federal government. Section 505(a)(1) asks the EEOC to do what it

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2. Some courts have decided that a Title VI litigant is entitled to declaratory and injunctive relief only, and not monetary damages. *Drayden v. Needville Independent School Dist.*, 642 F.2d 129 (5th Cir. 1981); *Concerned Tenants Ass'n. v. Indian Trails Apartments*, 496 F. Supp. 522 (N.D. Ill. 1980).

is already doing for victims of employment discrimination on one basis for victims of employment discrimination on another basis. The question before the EEOC in either case is the same: was this person discriminated against in the making of some employment decision? Once the EEOC has made its determination, the alleged discriminatee, if dissatisfied, may go to court.

In contrast, extending Title VII rights, remedies and procedures to victims of discrimination by federal grantees would present a host of new issues to the EEOC. First, it would take it beyond the realm of employment discrimination for the first time, to discrimination in housing, access, education, etc. Second, it would ask it to resolve the issue of what is a federally-funded program or activity, a question with which it has no familiarity.

The failure of Congress to extend Title VII to victims of §504 discrimination was obviously intended simply to short-circuit the EEOC, and for obvious reasons. Reading into the statutory framework of §505 an intention to drastically narrow the scope of §504 is a strained interpretation of an otherwise reasonably constructed provision. Support should be found in the legislative history before we should stretch so far.

IV

In order to be certain that Congress intended what the broad sweep of its language in §504 indicates, we must undertake a two-step analysis of legislative history. Section 504 should be read to prohibit employment discrimination "unless other considerations counsel to the contrary." Considerations counselling to the contrary may be found in the legislative history of §504 of the Rehabilitation Act of 1973 or the legislative history of the 1978 amendments, which introduced §505(a)(2) to the Act. We begin with the 1973 legislative history. Because we believe nothing in that history indicates Congress in-

tended anything less than it said, we then turn to the history of the 1978 amendments to determine if Congress, at that point, intended to narrow the scope of its prior enactment.

A

The legislation which would eventually become the Rehabilitation Act of 1973 was considered and passed by the Congress three times before it was finally signed into law by President Nixon on September 26, 1973. Sen. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted* in 1973 U.S. Code Cong. & Ad. News 2076, 2086-2090 [hereinafter cited at Sen. Rep. No. 93-318]. A provision prohibiting discrimination against the handicapped by federal grantees was part of all three measures, *id.* at 2078-2082, although it was not part of the original resolution passed in 1972 by the House. Comm. of Conf. Rep. H.R. 8395, 92d Cong., 2d Sess. *reprinted in* 118 Cong. Rec. 35141, 35163.

All versions of the legislation were lengthy, the first two even lengthier than the third. Certainly, the primary purpose of the legislation was to extend the 53-year-old vocational rehabilitation program, for another period of years, with a new mandate, in the original two bills, to give priority to the severly handicapped. In addition, the bills as originally submitted to the President authorized a program which, for the first time, would have provided rehabilitation services to severly handicapped individuals with no feasible vocational goals. In addition, the original two bills would have created a series of other new programs concentrating on particular sub-groups of the handicapped, such as older deaf and blind individuals with spinal cord injuries and individuals with end-stage renal disease. Finally, the bills would have mandated certain research and created a number of federal bodies to deal with particular problems of the handicapped. Sen. Rep. No. 93-318, 1973 U.S. Code Cong. & Ad. News at 2078-2079.

The first bill was pocket vetoed by the President on October 27, 1972. 118 Cong. Rec. 37203. The second bill was vetoed on March 27, 1973, 119 Cong. Rec. 9307, and the Senate failed to override the veto a week later, *id.* at 10794. Serious negotiations between the Administration and, primarily, the Senate then began. Sen. Rep. No. 93-318, 1973 U.S. Code & Ad. News at 2082. [sic].

The President's primary objection to the original two bills was that they authorized what he considered to be an excessive and inflationary amount of money to fund the proposed programs. He also objected to what he saw as a change of focus in the highly successful vocational rehabilitation program by requiring priority be given to the severely handicapped. He also opposed the proliferation of categorical grants to fund the new programs and the proliferation of federal commissions, councils and divisions. 118 Cong. Rec. 5880 (first veto memorandum); 119 Cong. Rec. 24570 (second veto memorandum). The final bill that was to become law was trimmed from seven titles to five. It required only that vocational rehabilitation programs give equal, not priority, treatment to the severely handicapped, eliminated all the proposed new programs, including the non-vocational rehabilitation program, eliminated most of the new federal bodies which would have dealt with the problems of the handicapped, and, of course, significantly lowered the amount of money authorized to fund the remaining legislation. Sen. Rep. No. 93-318, 1973 U.S. Code Cong. & Ad. News at 2079-2082.

At no time was there any dispute between the Administration and the Congress over the wisdom of the non-discrimination provision which would eventually be codified in §504. Neither was it ever a matter of controversy between the Senate and the House. Although it was not part of the first House resolution, the Senate version was accepted in conference with no more than the notation, "The House recedes." 118 Cong. Rec. 35163.

It is not surprising, therefore, that despite the pages of legislative history generated by an act debated and passed three times by Congress, that there is little reference to §504. There is no direct reference indicating that §504 was not meant to cover employment discrimination. However, there are several both direct and indirect references indicating the contrary.

The Rehabilitation Act was born in the Senate in the newly constituted Subcommittee on the Handicapped of the Committee on Labor and Public Welfare. The subcommittee was charged with examining *all* issues related to the handicapped, not just those raised by the vocational rehabilitation program. 119 Cong. Rec. 5882. The expanded focus of the bill which was reported by the subcommittee was certainly due, in part, to the wide focus of the subcommittee's mandate. The legislative history indicates one of the problems of the handicapped addressed by the subcommittee was the problem of employment discrimination.

Senator Cranston, who chaired the subcommittee for the purpose of considering the legislation extending the vocational rehabilitation program, commented during debate on various criticisms of the program which he felt could not be handled simply by amending the Vocational Rehabilitation Act itself. "Such problems, as *unfounded discrimination in employment* in housing, difficulties of access to places of work and treatment centers, and duplication and fragmentation of services across program lines were voiced repeatedly to the committee," he noted. (Emphasis added). *Id.* [3]

Discrimination in employment has a particularly detrimental impact on the vocational rehabilitation program, Senator Cranston noted:

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3. *See also*, the remarks of Senator Stafford, the ranking minority member of the subcommittee, 119 Cong. Rec. 5893; and Sen. Rep. No. 93-318, 93d Cong. 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2078.

> "[D]iscrimination in placement, hiring and advancement continue to limit the vocational rehabilitation program's ability to effect successful rehabilitations . . . The expenditure of money on vocational rehabilitation programs is not well spent if we do not at the same time take meaningful steps to eliminate architectural barriers and provide substantial accomplishments in employment for handicapped individuals."

Id.

These sentiments of Senator Cranston expressed during debate on the second incarnation of the act were echoed by Senator Taft during debate on the third incarnation of the act:

> The basic purpose of vocational rehabilitation continues to be to help physically and mentally handicapped individuals achieve the ability to work, earn, and live independently in their communities. Yet in spite of the relatively high success of this program, we still have a long way to go . . . Too many handicapped Americans are not served at all, too many lack jobs, and too many are underemployed — utilized in capacities well below the levels of their training, education, and ability.
>
> However, if we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all — discrimination.

Id. at 24587.

And, clearly, the Rehabilitation Act addressed the problem of employment discrimination. As described by Senator Javits, co-sponsor of the act, a member of the subcommittee and ranking minority member of the parent Committee on Labor and Public Welfare, "This

measure draws upon the experience of the past half century and provides new emphasis on the severely handicapped, the homebound, client services and participation, *opportunities for employment of the handicapped* and administration improvements." (Emphasis added). *Id.* at 5887. The bill as originally reported and ultimately enacted into law provided, in sections immediately preceding §504, for affirmative action programs to encourage the hiring of the handicapped by the federal government, 29 U.S.C. §791(b) and federal contractors, 29 U.S.C. §793. It is hard to imagine, in an Act whose primary goal is to enhance the vocational capabilities of the handicapped, that if the legislature had intended to limit the reach of a provision which immediately follows two sections whose express purpose is to encourage the hiring of the handicapped, that someone somewhere in the legislative history would not have said so. On the contrary, several members indicated the opposite.

During debate on the original bill, Senator Javits highlighted several new areas of federal responsibility recognized by the legislation: "I refer, for example, to . . . provisions for encouraging hiring of the handicapped under Federal contracts and Federal grants." 118 Cong. Rec. 32305. Senator Humphrey reviewed those provisions requiring affirmative action by federal contractors and prohibiting discrimination by federal grantees and found they embodied the intent of bills he had introduced earlier which would have amended both Titles VI and VII of the 1964 Civil Rights Act to include the handicapped. *Id.* at 32310. Finally, Senator Williams, chairman of the full Committee on Labor and Public Welfare, during debate on the third version of the bill, reviewed provisions retained from the first two versions, including, "prohibitions against discrimination in employment in programs assisted with Federal funds." 119 Cong. Rec. 24588.

These few direct references to §504 support the conclusion that the intent of Congress matched the

broad sweep of its language. We turn now to the question of whether Congress intended to narrow the scope of §504 by the 1978 amendments, specifically §505(a)(2).

B

Section 505(a)(2) originated in the Senate and was adopted by the Committee of Conference assigned to reconcile the Senate and House versions of the 1978 amendments to the Rehabilitation Act. House Conf. Rep. No. 95-1780, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 7375, 7404. Although the Joint Explanatory Statement of the Committee of Conference offers no assistance in interpreting the provision, noting only that the House receded in its opposition to §505(a)(2), *id.*, the report of the Senate Committee on Human Resources accompanying the original Senate bill discusses the purpose of the provision.

The Senate Committee notes that the then Department of Health, Education and Welfare had recently issued regulations enforcing the prohibition against handicap discrimination by federal grantees embodied in §504. These regulations are particularly noteworthy because HEW was assigned the task, by executive order, of coordinating the issuance of regulations enforcing §504 by all federal departments and agencies. These regulations, subsequently codified at 45 C.F.R. §84.1 *et seq.*, prohibited discrimination in employment practices, *id.* at §84.11. Nonetheless, the Committee stated:

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. *Thus, this amendment codifies existing practice as a specific statutory requirement.*

Sen. Rep. No. 95-890, 95th Cong. 2d Sess., p. 19. (Emphasis added).

The committee further stated that applying the provisions of Title VI to §504 of the Rehabilitation Act would assure "administrative due process, and provide for administrative consistency within the Federal Government." *Id.*

The committee report contains nothing that would indicate it felt HEW exceeded its statutory authority by prohibiting employment discrimination in its recently promulgated regulations. Similarly, no one during the debate in the Senate or House suggested HEW had gone too far. In fact, the only Congressman who directly mentioned the regulations during debate, Representative Dodd, "strongly supported the long-delayed issuance of the section 504 regulations believing then, as now, that the protections they establish for the handicapped are very much needed." 124 Cong. Rec. 13905.

Several proposed amendments to the act, and the debate on them, further indicate that Congress understood §504 to reach employment discrimination, when enacted and as amended. For example, Senator Cannon proposed during debate an amendment which, for the purpose of §503 and §504 of the Rehabilitation Act, would exclude from the definition of handicapped individual an alcoholic or drug abuser "whose condition of alcoholism or drug abuse renders that individual not qualified for employment . . ." The purpose of Senator Cannon's amendment, which was eventually passed and codified at 29 U.S.C. §707(7)(A), was: "To exclude alcoholics and drug abusers from certain employment provisions of the Rehabilitation Act . . ." 124 Cong. Rec. 30322. Its scope was considerably narrower than a similar measure proposed in the House which would have excluded alcoholics and drug abusers from the definition of handicapped individuals altogether, regardless of whether their condition impacted on their employability or not.

Clearly, Senator Cannon believed §504 reached employment discrimination, and nobody during the debate on his argument suggested otherwise. More specifically, nobody suggested that if §504 had at one time reached employment discrimination, the proposed §505(a)(2) would have the effect of eliminating it from its scope. Senator Williams, chairman of the Committee on Human Resources, spoke in support of Senator Cannon's amendment, which he felt necessary "because of misunderstandings and distortions concerning employment rights of alcoholics and drug dependent persons." *Id.* at 30323. Senator Williams felt the amendment "would reassure employers that it is not the intent of Congress to require any employer to hire a person who is not qualified for the position or who cannot perform competently in his or her job." *Id.*

Senator Hathaway also spoke in support of the amendment because he felt it would protect those many alcoholics and drug addicts who hold jobs and perform them satisfactorily. "Sections 503 and 504 of the Rehabilitation Act protect such persons employed by agencies which receive Federal funds or employers which have Federal contracts from being fired solely because of their alcoholism or drug addiction." *Id.* at 30324.

Another amendment proposed during debate would have amended §505(a)(1) to limit a court in an action brought against the federal government to equitable and affirmative action remedies proportionate to actual damages.[4] 124 Cong. Rec. 30576. Its sponsor, Senator McClure, described the amendment's function as insuring "that mammoth affirmative action remedies involving

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4. A compromise was reached later in debate, which resulted in the following language being inserted in §505(a)(1): "In fashioning an equitable or affirmative action remedy . . . a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy." 29 U.S.C. §794a(a)(1).

substantial construction could not be compelled in instances in which actual damages were comparatively small." *Id.*

Senator McClure's amendment was vehemently opposed by Senator Cranston, a sponsor of the 1978 act, on the basis that the federal government should be required to do no less than private employers. Senator Cranston argued:

> The amendment offered by the Senator from Idaho would create an unwise and unrealistic distinction with respect to employment between the obligations of the Federal Government and the obligations of Federal contractors and grantees. Ironically, the Senator's amendment would limit — with a financial test — the Federal Government's obligation of being an equal opportunity employer. Federal contractors and grantees would — appropriately — continue to be required to be equal opportunity employers.

Id. at 30577-30578.

Finally, we would note the remarks of Representative Jefford, a member of the Subcommittee on Select Education, which reported the House version of the act, commenting on the creation of the Architectural and Transportation Barriers Compliance Board in §118 of the amendments:

> [W]e gave this board new and expanded responsibilities *for this one aspect of §504*. It is our thought that by separating only the "physical" barriers . . . from actual discrimination in *jobs*, education, housing, and health, we have taken a significant step forward.

Id. at 13901. (Emphasis added).

None of the above-quoted references to employment discrimination brought forth any objections from the speakers' colleagues in the House and Senate. In-

deed, they did not bring forth so much as a question or request for clarification.

Combining the legislative history looking for the intent of Congress is often a frustrating chore. Often the intent of Congress hinges on the remarks of one or two individuals. *See North Haven, supra* at 4504. Here our task has not been so difficult. Clearly, the legislative history to the 1978 amendments demonstrates a widespread understanding on the part of Congress that §504, even as amended, proscribed employment discrimination against the handicapped.

C

Post-enactment pronouncements provide confirmation of Congressional intent to cover employment discrimination in §504. The Senate Committee on Labor and Human Resources, whose predecessors reported both the 1973 Rehabilitation Act and its 1978 amendments, stated unequivocally one year after *Trageser, supra:*

> *[Trageser]* is not consistent with Congress' original and continuing intent that handicapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of, [section 504] regardless of the designated use of the Federal funds received by the employer in question.

In 1980, responsibility for coordinating enforcement of §504 by federal departments and agencies was transferred to the Attorney General. In his analysis of rules promulgated pursuant to this authority, the Attorney General took note of HEW's earlier regulations prohibiting employment discrimination,. *Trageser* and *Carmi,* the legislative history of both the 1973 Act and the 1978 amendments, and concluded, "[T]he Depart-

ment believes that the employment practices of recipients of Federal financial assistance are covered by section 504 regardless of the purpose of the assistance . . ." Nondiscrimination Based on Handicap in Federally Assisted Programs — Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914, 45 Fed. Reg. 37620, 37628 (1980).

V

Under the holding of the district court, Conrail is prohibited from discriminating against handicapped passengers, but is free to discriminate against the handicapped in employment. Such an analysis of §504, unless supported by the words of the relevant statutes or their legislative history, is absurd.

Thus far, the handicapped have not been extended the broad protections against discrimination extended women and members of other minority groups. Federal law protects the handicapped only if employed by the federal government, or federal contractors or grantees. To eliminate protection against discrimination in employment by federal grantees would eliminate a substantial portion of the small amount of protection afforded the handicapped. What is a commonsensicle approach to Title VI, thus, becomes a devastating blow within the context of the Rehabilitation Act. "In the context of §504 of the Rehabilitation Act, applied *Trageser*-style, §604 operates as a blunderbuss." *Scanlon, supra* at 2163 (Ferguson, J., dissenting). *See also, Carmi, supra* at 679 (McMillan, J., concurring). Neither the words of the statutes, nor legislative histories, dictate such a result.

For this reason, the order of the district court is reversed, and the case remanded for further consideration and ultimate disposition on the merits.

ADAMS, *Circuit Judge*, concurring in the judgment.

Had this appeal been presented for resolution several months ago, I might well have joined the other four courts of appeals in concluding that the Act was not intended to cover discrimination against the handicapped by private employers. After all, the statute makes no direct reference to private employment, and it certainly is not unreasonable to read the restrictions contained in section 604 of Title VI into the Rehabilitation Act.

Nonetheless, I have concluded that the result reached by the Court in this case is consonant with, and perhaps even compelled by, two recent decisions, one by the Supreme Court, *North Haven Board of Education v. Bell*, 50 U.S.L.W. 4501 (U.S. May 17, 1982), and the second by this Court, *Grove City College v. Bell*, No. 80-2383, slip op., (3d Cir. Aug. 12, 1982). And whatever I might think of the wisdom of these two decisions, I am bound to apply them unless they are overruled.

In *North Haven*,[1] *supra*, the Supreme Court concluded that the Department of Education had statutory authority to regulate employment discrimination in education — even though Title IX of the Education Act makes no direct reference to employment, and even though Title IX, which was patterned after Title VI, might be thought to incorporate the employment-regulation restrictions of section 604 of Title VI. Nevertheless, the Justices reasoned that the broad-sweeping language of Title IX, which did not explicitly rule out the regulation of employment discrimination, when coupled with a strong legislative and postenactment history, constituted a sufficient basis from which to infer a congressional intent to bring employees within the protection of Title IX. The *North Haven* analysis, when applied to the

1. *North Haven* involved claims of gender discrimination committed by two public school districts in Connecticut. The Supreme Court noted that one of those districts, North Haven, "devoted between 46.8% and 66.9% of its federal assistance to the salaries of its employees." 50 U.S.L.W. at 4502.

words of the Rehabilitation Act — which for all relevant purposes are identical to the words of Title IX — and when considered in connection within the strong legislative history of section 504, would appear to compel a similar conclusion. The theory and analysis underlying *North Haven*, then, would suggest that LeStrange prevail on this appeal.

In addition to *North Haven*, I am persuaded that it would be difficult to arrive at a contrary result in this matter after the recent opinion in *Grove City, supra*. In *Grove City*, also decided under Title IX of the Education Act, a panel of this Court concluded that an entire educational institution is brought within the definition of "program," and therefore subject to regulation under Title IX, if it receives any federal aid, and that aid is general or indirect and not specifically earmarked for a particular educational function within the institution. The logic of *Grove City* would appear to be irreconcilable with the analysis employed in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), where an employer was deemed to fall within the purview of the Rehabilitation Act only if federal funds were received specifically for employment purposes.

For these reasons I join the judgment of the Court in returning this matter to the district court for further proceedings.

WEIS, *Circuit Judge*, concurring.

I join in the judgment of the court because I believe the case on which the district court relied, *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979) was erroneously decided. I agree that the issue in this case is not one of standing, as that term is ordinarily used, *see, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 50 U.S.L.W. 4103, 4105-06 (Jan. 12, 1982), but is the more direct question of the scope of §504.

Trageser held that the prohibition against handicap discrimination in §504 of the Rehabilitation Act is limited by the reference in §505(a)(2) to the provisions of Title VI of the Civil Rights Act of 1964. That is, a claim of employment discrimination against the handicapped is subject to §604 of Title VI: "Nothing contained in this subchapter shall be construed to authorize action . . . by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. §2000d-3.

Although it recognized that "§604 expressly curtails the authority of federal departments and agencies," the *Trageser* court concluded that "it also restricts private suits." 590 F.2d at 89. The court cited no authority for its conclusion and I am persuaded that it erred in applying §604 to private suits. The language of §604 confines its application to "action . . . by any department or agency" and does not refer at any point to suits brought by a private individual or entity.

The Rehabilitation Act's reference to Title VI was not intended to restrict the remedies of handicapped individuals but rather to limit the sanctions which government agencies could take against an offending recipient of federal financial assistance. Congress enacted §604 because it feared that when an employment violation occurred, an overzealous federal agency might threaten

the very existence of important programs by invoking the remedy of withholding funds.[1] The reference to Title VI in §505(a)(2) of the Rehabilitation Act must therefore be interpreted with the understanding that §604 was drafted to prevent administrative overkill. Viewed in this light, it is clear that the incorporation of §604 narrows not the rights of victims, but only the coercive measures which a "department or agency" can apply against an offender.

The dissenting opinion of Judge Ferguson in *Scanlon v. Atascadero State Hospital*, No. 80-5201 (9th Cir. May 24, 1982), analyzes the errors of the *Trageser* opinion at length. I agree with Judge Ferguson and see no need to repeat here the reasoning which underlies the conclusions we both reach. *See also, Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 676 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980), McMillian, J. (conc.).

It is worth noting that in *NAACP v. Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979), this court concluded that there is a private right of action under §504. Our holding today is wholly consistent with that case.

Of course, I intimate no views on the merits of this case and concur in the remand to the district court.

A True Copy:
Teste:
Clerk of the United States Court
of Appeals for the Third Circuit

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1. During congressional debates, Title VI was commonly referred to as the "cut-off-the-funds title." *See* Comment, *Employment Discrimination Against the Handicapped: Can Trageser Repeal the Private Right of Action*, 54 N.Y.U.L. Rev. 1173, 1186 n. 69.